IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1277 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

JINABHAI KALABHAI RAJPUT

Versus

STATE OF GUJARAT

Appearance:
MR JIVANLAL G SHAH, Sr.Counsel with P.J.Bhatt for Petitioner
MR BD DESAI, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 15/07/98

ORAL JUDGEMENT { Per : J.N. Bhatt, J. }

The appellant-original accused in a Sessions Case No.41 of 1991 has been convicted of an offence punishable under sec.20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act (N.D.P.S. Act), and has been sentenced to rigorous imprisonment for ten years and to pay a fine of Rupees One Lakh, and, in default, to undergo, rigorous imprisonment for, three years. By virtue of the impugned judgment and order dated, 03.10.1992, passed by learned Additional Sessions Judge, Bhavnagar, which is questioned before us in this appeal under sec.374(2) of the Code of Criminal Procedure, 1973 (Code).

Whether on the basis of the evidence of the prosecution, the appellant-accused could be said to be in exclusive and conscious possession of the contraband articles namely charas weighing 50 grams and 600 miligrams found from the suitcase recovered from the house of accused by the raiding party on 07-12-1990 ?

Whether the provision of section 42 of the N.D.P.S. Act had been complied or not ?

Whether the conviction of the appellant-accused recorded by the trial court for the offence punishable under sec.20(b)(ii) of the N.D.P.S. Act is legal and justified?

The aforesaid contentions raised before us are required to be examined in the light of the relevant facts and the proposition of law. Therefore, we propose to highlight a skeleton project of material facts.

Upon receipt of an intimation and information by the Police Sub-Inspector of Prohibition Branch of Bhavnagar Police Station that accused Rajput Jinabhai Kalabhai has illegally preserved and kept contraband articles like charas. The raid was affected in presence of panchas on 7.12.1990. A preliminary panchnama was drawn by calling two panchas at the Police Station, 1) Rajesh Jivabhai, 2) Chotubhai Amarsinh were the panchas. After following usual and necessary procedure, the raiding party left for the destination.

The raiding party after starting from the police station came to a premises bearing Plot No.1107 situated near Subashnagar, Kansara Kantha, Bhavnagar, at about 9.30 p.m. where a person was present, who on being questioned, mentioned his name. It was accused who was present in the premises. The residential premises were searched. Accused had objected his house being searched.

It is a house with the compound with one door facing East and a osari in front of the room with a kitchen adjoining the room. The raiding party members entered into the room after searching the other parts of the premises.

Upon searching the room, muddamal suitcase of rose colour was found which was open and it was found that it contained a plastic bag which was smelling and suspecting pieces of charas. Same came to be weighed. The weight was found 50 grams and 600 miligrams. After observing necessary procedure, the contraband items charas pieces were seized, which upon investigation by the Forensic Science Laboratory is reported to be a charas. Forensic Science Laboratory report, Exh.18, thus, proved that the articles seized and recovered from the suitcase beneath the big trunk (known as patara is bag) which was rose in colour and it was seized in presence of accused and the same was identified as charas.

After having considered the facts and circumstances emerging from the record, the prosecution have successfully proved that the contraband articles charas weighing 50 grams and 600 miligrams was found from the said suitcase. The learned Additional Sessions Judge has held that the contraband charas was in the possession of the appellant-accused. The trial court found appellant-accused guilty of the offence punishable under sec.20(b)(ii) of the N.D.P.S. Act, on the basis of the evidence of the members of the raiding party. The report of the Forensic Science Laboratory report Exh.18 and relying on the provisions of sec.35 and sec.54 of the N.D.P.S. Act.

Sec.20(b)(ii) provides punishment against the person whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, is found in possession of the contraband articles. The case of the prosecution is that the muddamal contraband article charas was in the possession of the accused, and, therefore, he is guilty of the offence punishable under sec.20(b)(ii) of the N.D.P.S. Act. It, therefore, becomes clear that the possession must be proved by the prosecution. The nexus between accused and the contraband drug or articles ought to be established first so as to raise the statutory presumption under sec.35 and sec.54 of the N.D.P.S. Act.

The trial court has placed reliance on the evidence of raiding party and police officer in reaching to the conclusion that the accused possessed contraband articles item charas.

The finding of fact of the possession of the charas was of the accused is, seriously, challenged. Prosecution placed reliance on the evidence of seven prosecution witnesses. The panchnama of the seizure of charas, at Exh.9, was prepared by the Police Sub-Inspector of the raiding party in presence of following two panchas 1) Rajesh Jivabhai, 2) Chotubhai Amarsinhbhai. Both panchas have turned hostile to the prosecution case. Thus, they have not supported the prosecution version that the illegal charas that was searched and seized, belonged to or possessed by accused. The trial court has, therefore, placed reliance on the evidence of prosecution witness No.3 Nanbha Zilubha (Exh.11), who was Police Constable of Bhavnagar Police Station on the date of the raid. The trial court has placed reliance on the evidence of prosecution witness No.7, Kanubhai Narottambhai Patel (Police Sub-Inspector) at Exh.16.

The reliance was placed by the trial court on the decision of this court rendered in the State of Gujarat vs. Abdul Rashid Ibrahim Mansuri and also on the decision of the Apex Court - A.I.R. 1971 Supreme Court -28. The principle laid down in the said decision is that the reliance on the evidence of the police officer can be made if their evidence is found trustworthy and dependable. It is, further clearly, held that their evidence cannot be distrusted or discarded merely because a witness is a police officer. Therefore, the settled proposition of law is that the evidence of the police officer can be accepted without corroboration if it radiates an imprinting of truth.

However, the question is whether prosecution has successfully established nexus between the accused and the illegal charas. In another words, could it be said without doubt that from the evidence of the police officer relied on by the prosecution and accepted by the trial court, it could be concluded that the illegal charas belonged to the accused only and he was in possession. The contraband articles charas from the rose suitcase which was beneath a big trunk (patara is Bag) from the house of the accused as per the evidence of the police officer. The evidence of the police officer was accepted by the trial court at its face value and came to conclude that the illegal charas was possessed of by the accused since it was found from the suitcase in the house of the accused. Apart from the challenge to the fact of the ownership of the house, it is, clearly, admitted by the Police Sub-Inspector Mr. Kanubhai N. Patel (Exh.16) in his evidence that the said house was in the name of

the father of the accused and the accused was residing with other members in the family. Even when the raiding party made the raid, the doors of the house were opened. In this context, the challenge made by the defence that the prosecution has not, successfully, proved without any doubt that the said contraband charas was found from the exclusive possession of the accused merits serious consideration.

After having examined the facts and circumstances and the evidence of the police officers on which the reliance made by the prosecution and which is accepted by the trial court, it has not been established beyond doubt that the accused was possessed of the illegal charas found from the suitcase. It may be possessed by him or it may not be possessed by him. What is requirement of the law is it must prove and not may be. There is a wide distance between `may be' and `must be'. This important aspect has not been properly appreciated by the trial court.

The statutory presumption incorporated under sec.35 and sec.54 of the N.D.P.S. Act would be attracted only when first important part of the possession of the contraband articles by the accused is established without doubt. Sec.54 provides statutory presumption of culpable state of the accused. Looking to the seriousness nature of the offence of drug trafficking which effects the society at large, designely and devisedly, the Parliament in its wisdom has provided two statutory presumption under sec.35 and sec.54 of the N.D.P.S. Act. The culpable mental state shows the intention, knowledge or motive which, at times, may be difficult, to establish, and therefore, under sec.35 presumption of the culpable mental state of the accused is provided for. With the result, in any prosecution for an offence under the provision of N.D.P.S. Act, which means culpable state of mind of the accused. The court is empowered to presume the existence of such mental state of an accused. Of course that presumption would come into play only after the link between the illegal or contraband drug or articles and the accused is established without doubt. Again it is a presumption, therefore, it will always be open to the accused to prove that the statutory presumption of culpable mental state of mind of the accused was not in existence in a particular given case. Since we have found that the prosecution has not been, successfully able to prove that the illegal charas was found from the suitcase belonged to or was in possession of the accused, the provision of sec.35 would not be attracted.

So is the proposition even in the case of provision of sec.54 which prescribes a presumption from possession of illicit articles, it read as under:

> ".....In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of -
>
> (a) any narcotic drug or psychotropic substance;
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> (b) any opium poppy, cannabis plaint or coca plant growing on any land which he has cultivated;
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> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or
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> (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured, for the possession of which he fails to account satisfactorily."

It could be very well understood from provision of sec.54 also that the statutory presumption in sec.54 of the N.D.P.S. Act could also be attracted upon the proof of the possession of the contraband articles by the accused. Therefore, it must be noted that the possession by the accused or of the accused is a sine-qua-non if that is established without doubt which could be established even from the evidence of the police officer and even in case of the panchas turning hostile to the prosecution case. The presumption incorporated under sec.35 and 54 of the N.D.P.S. Act would be attracted. So is not the factual scenario and the proposition in the present appeal.

The learned advocate has also raised the following contentions in assailing the conviction of the appellant-accused. The prior information having been not taken down even writing by the police officer concerned. There was information and observance of the provision of sec.42(1) and resultant breach of sec.42(2) of the N.D.P.S. Act, on account of which the trial shall vitiate.

The following aspect in this connection may be highlighted. It is an admitted fact that the raiding

party and the concerned police officers had received the information and the intimation that the appellant-accused was illegally possessing contraband charas in his house.

It is clearly mentioned in the first part of the panchnama Exh.9 that the panchas were called only upon such information having been received by the Prohibition Branch of the Station Gate Police Station, Bhavnagar.

It is also admitted fact that the information so received was not written down. The information was received at 9.00 p.m. and the raid was affected at 9.30 p.m. on 7.12.90.

The police constable Nanbha Zilubha, prosecution witness No.3 (Exh.11) and prosecution witness No.7 Kanubhai Narottam Patel at Exh.16, have not stated that the information so received was reduced to writing as required by sec.42(1) of the N.D.P.S. Act. On the contrary, it is, clearly, admitted by the Police Sub-Inspector prosecution witness No.7 who has admitted that information was not reduced to writing as there was no such practice.

The intimation to the Superior authority was also not given on phone after raid was affected. Subsequently, the yadi was sent to the District Superintendent of Police about the seizure of the contraband charas.

It is also admitted by the Police Sub-Inspector that the copy of such writing was not given to the accused.

It is also an admitted fact that no such copy was brought on record of the police station dairy.

In view of the aforesaid unassailable aspects, it would be better to examine the provision of sec.42, which read as under:

> "...Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special

order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance;

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

It becomes very clear from the fact of the present case that there was a breach of provision of sec.42(1) and sec.42(2) of the N.D.P.S. Act. Provision of sec.42 of the N.D.P.S. Act are mandatory and non-observance or

non-compliance would vitiate the trial. This proposition of law is extensively explored by catena of judicial pronouncements essentially starting from the case of the State of Punjab Vs. Balbirsingh - A.I.R. 1994 Supreme Court 1872. It has been, clearly, held the provision of sec.42 are mandatory. The said decision is also followed by the Apex Court in Mohindrakumar Vs. State of Goa. In that case, it was found by the Apex Court that the mandatory requirement of the proviso of sec.42(1) and sec.42(2) of the N.D.P.S. Act must be complied with and non-compliance would vitiate the trial resulting into the acquittal of the accused.

It is very evident from the evidence of the present case and as such not in dispute that the proviso of sec.42(1) has not been followed in the present case. It is a, mandatory, requirement. The raid was effected in the present case at 9.30 p.m., on 7.12.1990, in the residential house plot No.1107 situated, at Subashnagar, Near Kansara Kantha, Bhavnagar. The proviso commands that the police officer who has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. There is a purpose behind enacting such a proviso in sec.42(1) of the N.D.P.S. Act. The person who is not authorised for search without a search warrant in an emergent situation is empowered to act. If the search is to be made any time between sunrise and sunset, but upon the requirement recording the ground of his belief, no such formality or requirement has been carried out. Thus, there is clear breach of the mandatory provision of sec.42(1) of the N.D.P.S. Act. Obviously, when the grounds were not recorded "ipso-facto" there would not be compliance of provision of sec.42(2) of the N.D.P.S. Act. It is not disputed that the concerned police officer, who had received the information about the illegal possession of the contraband articles charas was not reduced to writing or recorded the grounds for his belief under the proviso thereto, copy shall be transmitted to the immediate superior officer. Therefore, there is also a breach of provision of sec.42(2) of the N.D.P.S. Act.

After having considered the facts and circumstances emerging from the record of the present case and having given anxious thought to the relevant proposition of law, we have no hesitation in finding that the impugned judgment and order is required to be quashed and set

aside as the whole trial stand vitiated on account of non-observation of mandatory provision of sec.42(1) and sec.42(2) of the N.D.P.S. Act.

For the aforesaid grounds and reasons, the conviction and sentence order of the appellant-accused cannot be sustained in law. It is, therefore, quashed and set aside. Appellant-accused is therefore held not guilty of the charges levelled against him. As a consequence, the appellant-accused shall stand acquitted of the said charges. Appeal is, therefore, allowed. The appellant-accused shall be set at liberty forthwith if not required in any other case and the amount of fine, if paid, shall be refunded to the appellant-accused.

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